(1)

Supreme Court, U.S.
FILED
APR 16 1992
OFFICE OF THE CLERK

91-1654

No. _____

In the
Supreme Court of the United States
October Term, 1991

STARKEY LABORATORIES, INC.,
Petitioner,

v.

GN DANAVOX, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Robert M. Wattson
Counsel of Record
Lawrence T. Hofmann
ZELLE & LARSON
33 South Sixth Street
City Center, Suite 4400
Minneapolis, Minnesota 55402
(612) 339-2020

Attorneys for Petitioner
Starkey Laboratories, Inc.

1992 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

5/

QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether Minnesota Statute § 549.20 violates a defendant's right to Due Process by permitting a jury to consider the financial condition of a defendant when assessing and imposing punitive damages.

2. Whether Minnesota Statute § 549.20, as applied below, violated Starkey's right to Due Process by permitting the jury to consider Starkey's financial condition when assessing and imposing punitive damages.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Petitioner Starkey Laboratories, Inc. states that it is an existing corporation incorporated under the laws of the State of Minnesota. Starkey Laboratories, Inc. has no parent company and no domestic subsidiaries. Starkey's non-wholly owned international subsidiaries are Starkey Laboratories, Ltd., a U.K. corporation, and Starkey France S.A.R.L., a French corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 STATEMENT ii

LIST OF APPENDICES v

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT UNDER RULE 29.4(c) 3

STATEMENT OF THE CASE

A. THE PARTIES 3

B. THE ACTION BELOW 3

1. The Complaint 3
2. The Trial 4
3. Starkey's Appeal 4
4. The Decision of the Minnesota Court of Appeals 5
5. The Order of the Minnesota Supreme Court 5
6. Starkey's Petition For Rehearing and Reconsideration 5

REASONS FOR GRANTING THIS PETITION 6

I. COURTS ACROSS THE NATION HAVE REPEATEDLY RENDERED OPINIONS WHICH ACTUALLY CONFLICT WITH THE DUE PROCESS DICTATES OF *HASLIP* AND WITH EACH OTHER 6

A. In *Haslip,* The Jury's Discretion In Awarding Punitive Damages Was Limited By The Exclusion Of Any Evidence Of The Defendant's Financial Condition 6

B. Many Courts Are Failing To Follow The Clear Dictates Of *Haslip* 7

II. MINNESOTA STATUTE § 549.20 VIOLATED STARKEY'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, BY ALLOWING THE JURY TO CONSIDER STARKEY'S FINANCIAL CONDITION WHEN IT FIXED AND IMPOSED THE PUNITIVE DAMAGE AWARD 10

CONCLUSION 12

LIST OF APPENDICES

Page

APPENDIX A

ORDER AND MEMORANDUM OF HENNEPIN COUNTY DISTRICT COURT, DATED DECEMBER 5, 1990 ..... A-1

APPENDIX B

OPINION, MINNESOTA COURT OF APPEALS, RELEASED OCTOBER 8, 1991 ..... A-9

APPENDIX C

ORDER, MINNESOTA SUPREME COURT, DATED DECEMBER 17, 1991 ..... A-18

APPENDIX D

ORDER, MINNESOTA SUPREME COURT, DATED JANUARY 17, 1992 ..... A-19

APPENDIX E

TRANSCRIPT, MOTION IN LIMINE, DATED AUGUST 23, 1991 ..... A-20

APPENDIX F

TRANSCRIPT, RESPONDENT'S SUMMATION ON PUNITIVE DAMAGES, DATED AUGUST 23, 1991 ..... A-24

TABLE OF AUTHORITIES

Page

Adams v. Murakami,
813 P.2d 1348 (Cal. 1991) 8

Coyne v. Allstate Ins. Co.,
771 F. Supp. 673 (E.D. Pa. 1991) 8

Dunn v. Owens-Corning,
774 F. Supp. 929 (D. V.I. 1991) 8

Glassrock v. Armstrong Cork Co.,
946 F.2d 1085 (5th Cir. 1991),
reh'g denied, 951 F.2d 347 9

GN Danavox, Inc. v. Starkey Laboratories, Inc.,
476 N.W.2d 172 (Minn. Ct. App. 1991),
rev. denied, reh'g denied (1992) 1

K-Mart Corp. v. Pearson,
818 S.W.2d 410 (Tex. Ct. App. 1991) 8

Newport v. Facts Concerts, Inc.,
453 U.S. 247 (1981) 8, 9

Oberg v. Honda Motor Co., Ltd.,
814 P.2d 517 (Or. Ct. App. 1991),
recon. denied, rev. allowed,
822 P.2d 1194 (Or. 1991) 9

Pacific Mutual Ins. Co. v. Haslip, ___ U.S. ___,
111 S.Ct. 1032 (1991) 5, 6, 7, 8, 10, 11

Robertson Oil Co., Inc., v. Phillips Petroleum Co.,
779 F. Supp. 994 (W.D. Ark. 1991) 9

State Farm Mutual Auto. Ins. Co. V. Zubiate,
808 S.W.2d 590 (Tex. Ct. App. 1991),
error denied, reh'g overruled 8

United States Constitution

Fifth Amendment 2
Fourteenth Amendment 2

Statutes

Minn. Stat. § 549.20 2

PETITION FOR CERTIORARI

Starkey Laboratories, Inc. ("Starkey") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Minnesota entered in this case on October 8, 1991.

OPINIONS BELOW

The post-trial Order and Memorandum issued by the Hennepin County District Court of the State of Minnesota are unreported. [App. A-1]. The Opinion of the Minnesota Court of Appeals is reported as *GN Danavox, Inc. v. Starkey Laboratories, Inc.,* 476 N.W.2d 172 (Minn. Ct. App. 1991), *rev. denied, reh'g denied.* (1992). [App. A-9]. The Orders issued by the Minnesota Supreme Court denying the respective Petition for Review and the Petition for Rehearing and Reconsideration are unreported. [App. A-18 and A-19].

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The Opinion of the Minnesota Court of Appeals was filed on October 8, 1991. [App. A-9]. A timely Petition for Review was summarily denied by the Minnesota Supreme Court, without opinion, in an Order dated December 13, 1991. [App. A-18]. A timely Petition for Rehearing and Reconsideration was denied, without opinion, by an Order of the Minnesota Supreme Court dated January 17, 1992. [App. A-19].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

2. The Fourteenth Amendment, Section I of the United States Constitution provides in relevant part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Minnesota Statute § 549.20 provides:

> Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public, arising from defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situtated persons, and the severity of any criminal penalty to which the defendant may be subject.

STATEMENT UNDER RULE 29.4(c)

Since this proceeding draws into question the constitutionality of Minnesota Statute § 549.20, and neither the State of Minnesota, nor any agency, officer, or employee thereof, is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable and a copy of this Petition shall be served upon the Attorney General of the State of Minnesota.

STATEMENT OF THE CASE

A. THE PARTIES.

Petitioner is Starkey Laboratories, Inc., ("Starkey"), a Minnesota corporation engaged in the business of manufacturing and selling various products, including hearing aids. Starkey's headquarters are located in the Minneapolis, Minnesota metropolitan area.

Respondent is GN Danavox, Inc. ("Danavox"), a Minnesota corporation engaged in the business of manufacturing and selling hearing aids. Danavox is also located in the Minneapolis, Minnesota metropolitan area.

B. THE ACTION BELOW.

1. The Complaint

Danavox sued Starkey in Minnesota state court seeking compensatory and, ultimately, punitive damages against Starkey alleging a variety of wrongful acts, including supposed oral defamation of Danavox by Starkey employees ("oral defamation claim"), and the distribution by Starkey of an advertising flyer ("Flyer") to its customers on July 18, 1987 which contained statements allegedly defamatory to Danavox ("Flyer defamation claim").

The complaint filed on August 3, 1987 by Danavox contained claims for (1) a violation of Minnesota Statute § 325D.43 (deceptive trade practices); (2) defamation; (3) intentional interference with business relations; (4) a violation of Minnesota Statute § 325F.67 (false advertising); and (5) a violation of Minnesota Statute §

325F.69 (consumer fraud). In June 1988, Danavox amended its complaint to include a claim for trademark infringement. In August 1988, Danavox again amended its complaint to include claims for (1) breach of contract; and (2) punitive damages under Minnesota Statute § 549.20.

2. The Trial.

In August 1990, this case was tried before a jury. After the counts for trademark infringement, interference with contract, consumer fraud and false advertising were dismissed, the oral defamation, Flyer defamation, breach of contract and deceptive trade practice claims were submitted to a jury. On August 22, 1990, the jury returned a special verdict in favor of Danavox on its breach of contract claim, awarding damages of $4,729.20, and on its Flyer defamation claim, awarding $517,752 in compensatory damages. In addition, the jury found that Starkey had violated Minnesota's deceptive trade practices statute, upon which the district court awarded Danavox $13,846 for attorney's fees and $13,325.50 for costs and disbursements. The jury expressly rejected Danavox's oral defamation claim. Thus, at trial Danavox prevailed on the breach of contract, deceptive trade practice and Flyer defamation claims, while Starkey prevailed on the oral defamation claim.

Following a separate hearing, on August 23, 1990, the jury returned a special verdict under Minnesota Statute § 549.20 awarding $1.5 million in punitive damages on Danavox's Flyer defamation claim.

Starkey filed a timely Motion for Judgment Notwithstanding the Verdict or, in the alternative, Remittitur or, in the alternative, a New Trial on all of Danavox's successful claims. By Order and accompanying Memorandum dated December 5, 1990, the district court denied Starkey's alternative post-trial motions in their entirety. [App. A-1].

3. Starkey's Appeal.

Starkey appealed the district court's denial of its post-

trial motions to the Minnesota Court of Appeals. The matter was briefed, and was argued on July 15, 1991. Starkey raised and argued the constitutional challenges at issue here at the district court level, again before the Minnesota Court of Appeals, and in its Petition for Review and Petition for Rehearing and Reconsideration to the Minnesota Supreme Court.

4. The Decision of the Minnesota Court of Appeals.

On October 8, 1991, a panel of the Minnesota Court of Appeals filed its Opinion affirming the district court's denial of Starkey's post-trial motions, and rejecting Starkey's constitutional challenges to the punitive damage award. [App. A-9].

In direct contravention of this Court's holding in *Pacific Mutual Ins. Co. v. Haslip,* ___ U.S. ___, 111 S.Ct. 1032 (1991), which was rendered in the interim between post-verdict and appellate review in this case, the Minnesota Court of Appeals rejected Starkey's constitutional *Haslip* challenge to the jury's statutory obligation to consider Starkey's financial condition when fixing punitive damages.

5. The Order of the Minnesota Supreme Court.

Starkey filed a timely Petiton for Review to the Minnesota Supreme Court on November 7, 1991 which was summarily denied, without opinion, in an Order dated December 13, 1991. [App. A-18].

6. Starkey's Petition for Rehearing and Reconsideration.

Starkey filed a timely Petition for Rehearing and Reconsideration to the Minnesota Supreme Court on December 23, 1991, which was denied, without opinon, in an Order dated January 17, 1992. [App. A-19].

REASONS FOR GRANTING THIS PETITION

This case squarely presents an opportunity for this Court to rule definitively upon an issue which continues to befuddle lower courts in both the federal and state systems. Even after publication of the *Haslip* decision, such courts have not and apparently cannot reach a consensus on an issue of critical importance - whether or not evidence of a defendant's net worth or wealth should be admitted into evidence and considered by juries in assessing punitive damage awards. Many courts, ostensibly applying *Haslip,* have nonetheless emasculated its letter and spirit by permitting juries to consider evidence of the financial condition of defendants. These rampant departures from *Haslip* constitute a serious and pressing problem involving denials of recognized Due Process protections which, if left unremedied, will mislead even more courts into reliance upon decisions rendered in contravention of the *Haslip* principles.

I. COURTS ACROSS THE NATION HAVE REPEATEDLY RENDERED OPINIONS WHICH ACTUALLY CONFLICT WITH THE DUE PROCESS DICTATES OF *HASLIP* AND EACH OTHER.

A. In *Haslip,* The Jury's Discretion In Awarding Punitive Damages Was Limited By The Exclusion Of Any Evidence Of The Defendant's Financial Condition.

In *Haslip,* this Court stated that unlimited jury discretion in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. 111 S.Ct. at 1043. Recognizing that punitive damages are a powerful remedy which may be abused, causing serious damage to private interests, this Court held that where a jury's discretion is guided and exercised within reasonable constraints, Due Process is satisfied. *Id.* at 1044. These "reasonable constraints," are to be imposed by certain

jury instructions, which serve to limit the jury's discretion in light of the nature and purpose of punitive damages -deterrence and retribution. *Id.*

More importantly, these acknowledged constraints were expressly noted to be reasonable and constitutionally firm precisely because the *Haslip* jury was not permitted to receive or consider any evidence of the defendant's financial condition or wealth when awarding punitive damages. *Id.* As this Court said: "[Alabama] plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045.

As expressly recognized by this Court in *Haslip,* a jury's consideration of the financial status of a defendant does not bear justly on the nature and purposes of punitive damages; such consideration inherently breeds arbitrary and irrational deprivation of a defendant's property in violation of Due Process guarantees under the United States Constitution. An opposite view fails to realize that two defendants, one rich and one poor, who are found liable for the same wrongful conduct may be subject to vastly different punishment precisely because of the size of their respective bank accounts, and irrespective of the fact that the conduct involved is identical. Such arbitrary and discriminatory treatment is reprehensible under Due Process.

B. Many Courts Are Failing To Follow The Clear Dictates Of *Haslip*.

In judicial practice and application, the constitutional parameters espoused in *Haslip* are not being uniformly applied. It has become typical of many courts, when faced with a Due Process challenge to punitive damage awards, to simply cite to *Haslip* for the mere proposition that the imposition of punitive damages does not violate Due Process under the Fifth and Fourteenth Amendments of the Constitution. After that brief recitation, these courts proceed to dismiss Due Process challenges to punitive damage awards as without merit - without any *Haslip* analysis of the scheme under which the award was fixed and imposed.

This unfortunate trend is definitely true with respect to Due Process challenges to a jury's consideration of a defendant's financial condition when awarding punitive damages. Despite the strictures of *Haslip,* courts, like the Minnesota Court of Appeals in this case, have repeatedly upheld punitive damage awards which were rendered by juries supplied with direct evidence of a defendant's net worth or wealth. *Adams v. Murakami,* 813 P.2d 1348 (Cal. 1991) (evidence of the defendant's financial condition is essential to the integrity of the fact-finding process underlying the punitive award). *See also K-Mart Corp. v. Pearson, 818 S.W.2d 410 (Tex. Ct. App. 1991); Dunn v. Owens-Corning,* 774 F. Supp. 929 (D. V.I. 1991); and *Coyne v. Allstate Ins. Co.,* 771 F. Supp. 673 (E.D. Pa. 1991).

Other courts have found creative ways to circumvent *Haslip* on the issue of the admissibility of a defendant's net worth. A Texas appellate court of appeals, addressing this exact issue, while mentioning *Haslip's* general holding in passing, erroneously relied upon language in this Court's 1981 decision of *Newport v. Facts Concerts, Inc.,* 453 U.S. 247 (1981), for the proposition that a defendant's net worth is a proper evidentiary factor in determining punitive damages. *State Farm Mutual Auto. Ins. Co. v. Zubiate,* 808 S.W.2d 590, 603 (Tex. Ct. App. 1991), *error denied, reh'g overruled.*

The *Zubiate* court's reliance on *Newport* was unequivocally misplaced - the constitutionality of punitive damages was *not* at issue in *Newport.* Rather, *Newport* held that punitive damages are not recoverable against a municipality in federal civil rights actions. More importantly, and as noted in Justice O'Connor's dissent in *Haslip,* 111 S.Ct. at 1140, *Newport* was premised in part on the prejudicial impact of the defendant's wealth on amount of the punitive award:

> Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, [citing

> the Restatement [Second] of Torts] the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be unpredictable and, at times, substantial . . . Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk.

453 U.S. at 270.

A similar evasion of *Haslip* is found in *Oberg v. Honda Motor Co., Ltd.,* 814 P.2d 517, 524 (Or. Ct. App. 1991), *recon. denied, rev. allowed,* 822 P.2d 1194 (Or. 1991), where the court held that since the jury considered the same factors when *assessing* punitive damages as the *Haslip* appellate court did when *reviewing* the punitive award for excessiveness, including the financial condition of the defendant, the award did not violate Due Process. Such a blind comparison, identical in nature to that made by the Minnesota Court of Appeals in this case, fails to recognize the inherent differences in the roles of a jury and an appellate court.

One federal court journeyed down a unique avenue to avoid finding a Due Process violation. In *Robertson Oil Co., Inc. v. Phillips Petroleum Co.,* 779 F. Supp. 994, 997 (W.D. Ark. 1991), the court placed the onus on defendant's counsel to argue away the unconstitutional effects of the admission of its client's net worth during closing argument.

Finally, a somewhat blinded Fifth Circuit court, claiming that it was unable to detect any significant difference between the jury instructions at issue and those approved by *Haslip,* upheld a punitive award on Due Process grounds. However, a critical and obvious variation between the two sets of jury instructions was that the jury, unlike the *Haslip* jury, was expressly instructed to "consider the financial resources of the Defendant in fixing the amount of [punitive] damages." *See Glassrock v. Armstrong Cork Co.,* 946 F.2d 1085, 1097 (5th Cir. 1991), *reh'g denied* 951 F.2d 347.

These cases clearly illustrate that the tenets of the *Haslip* opinion are consistently being slighted by courts across the country, including the Minnesota Court of Appeals in this case. Such departures from *Haslip* have created a genuine conflict that has clearly placed defendants across the nation in the same unenviable position they were in before this Court decided *Haslip* -that is, open to the imposition of arbitrary and discriminatory punitive damages based upon the plaintiff's "good fortune to have a defendant with a deep pocket." 111 S.Ct. at 1045.

II. MINNESOTA STATUTE § 549.20 VIOLATED STARKEY'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, BY ALLOWING THE JURY TO CONSIDER STARKEY'S FINANCIAL CONDITION WHEN IT FIXED AND IMPOSED THE PUNITIVE DAMAGE AWARD.

Punitive damages in Minnesota are a matter of statutory law. Minnesota Statute § 549.20, the statute governing the measurement, imposition, post-verdict and appellate review of punitive damage awards, sets forth the factors by which punitive damages *shall* be measured.

In Minnesota, unlike the Alabama punitive damages scheme in *Haslip,* one factor to be considered by the jury when imposing punitive damages is the financial condition of the defendant - a factor which propels otherwise limited jury discretion into the realm of constitutional Due Process impropriety. Instructing the jury to consider the net worth or wealth of a defendant clearly confers an open-ended "anything goes" quality on the task of measuring punitive damages. Such consideration bears no reasonable relationship to the nature and purposes of punitive damages and, as this Court has noted, launches otherwise limited jury discretion into unbridled discretion which violates Due Process, and unjustly penalizes unpopular and "deep pocket"

defendants. *Haslip,* 111 S.Ct. at 1045.

That is exactly what happened in this case. At the punitive damages portion of the trial, Starkey's 1987, 1988 and 1989 year-end financial statements were admitted into evidence. The 1988 and 1989 financial statements were admitted over Starkey's objection that since the retained earnings reflected in each of the financial statements were cumulative, this duplicative information would mislead the jury into believing that retained earnings were actually and separately realized in 1987, 1988 *and* 1989. [App. A-20]. The admission of this financial information, coupled with its tendency to deceive and misguide the jury, allowed the jury to exercise its discretion arbitrarily and prejudicially.

During her closing argument, Danavox counsel compounded and enhanced the likelihood of the jury imposing a discriminatory punitive award. The jury was inundated with numerous references to Starkey's financial condition, including the phrases "enormous profits," "[D]o these people have enough money?", "all of the money" in Starkey's "pockets," comments regarding its position and growth in the industry, and strapping dollar amount recitations of Starkey's increase in profits over the years and its $25 million net worth at the time of trial. [App. A-24].

In total, the admission of Starkey's financial condition, not to mention the seriously misleading nature of this information, and the repeated stress on Starkey's financial success by Danavox's counsel during her summation clearly illustrate that Danavox did "enjoy a windfall because (it) had the good fortune to have a defendant with a deep pocket." *See Haslip,* 111 S.Ct. at 1045. It is inconceivable that Starkey's $25 million net worth did not critically compromise the jury's ability to rationally determine the amount of the punitive award in this case, particularly given the isolated conduct involved.

CONCLUSION

In light of *Haslip,* Minnesota's punitive damages statutory scheme, in general and as specifically applied in this case, is lacking in fundamental fairness. The obligation of Minnesota jurors to consider a defendant's financial condition when fixing and imposing punitive damages clearly violates Due Process. Consideration of the depth of a defendant's pocket gives a jury unbridled and unlimited discretion - discretion which impermissibly extends consideration beyond the nature and purpose of punitive damages. With such information in the minds of jurors, any meaningful standards for measuring and imposing punitive damages are suppressed, and limited jury discretion transformed into arbitrary, prejudicial and unpredictable decision-making.

For the above reasons, this situation requires remedy by this Court. It is submitted that Starkey's Petition should be granted.

April 15, 1992.

Respectfully submitted,

Robert M. Wattson
Counsel of Record
Lawrence T. Hofmann
ZELLE & LARSON
33 South Sixth Street
City Center - Suite 4400
Minneapolis, Minnesota 55402
(612) 339-2020

Attorneys for Petitioner
Starkey Laboratories, Inc.

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT
G. N. Danavox, Inc., a Minnesota corporation, Plaintiff, vs. Starkey Laboratories, Inc., a Minnesota corporation, Defendant.	Court File No. 87-18918 ORDER

The above-entitled matter came on for hearing before this Court on November 16, 1990 at 4:00 P.M. in Courtroom 359 in the Hennepin County Government Center in the City of Minneapolis, County of Hennepin, State of Minnesota, pursuant to defendant's motions pursuant to Rules 50.02 and 59, District Court Rules of Civil Procedure for judgment notwithstanding the verdict or, in the alternative, for remittitur or, in the alternative, for a new trial on all issues submitted to the jury. Plaintiff was represented by its attorney Sandra F. Gilbert, Esq. Defendant was represented by its attorney John B. Lunseth, II, Esq.

The Court having heard the arguments of counsel for the parties, read the memorandum submitted by the parties and being duly advised of the files and records herein and having considered the matter, makes the following Order,

IT IS ORDERED:

1. That the motion of defendant Starkey Laboratories, Inc. for judgment notwithstanding the verdict is denied.

2. That the motion of defendant Starkey Laboratories, Inc. for a new trial is denied.

3. That the motion of defendant Starkey Laboratories, Inc. for a remittitur on all damage claims is denied.

The attached Memorandum is hereby made a part of this Order.

Dated: December 5th 1990.

BY THE COURT:

Daniel R. Hart, Judge

MEMORANDUM

Defendants motion for judgment notwithstanding the verdict is based upon numerous contentions. The jurors found that defendant Starkey Laboratories, Inc. had breached a contract is had entered into with plaintiff G. N. Danavox, Inc. and awarded plaintiff damages arising out of this breach of contract. The jurors found that defendant Starkey Laboratories, Inc. defamed plaintiff G. N. Danavox, Inc. by publishing a written flyer in mid July, 1987, and awarded plaintiff damages incurred due to the defamation. The jurors found that the actions of defendant Starkey Laboratories, Inc. which constituted defamation toward plaintiff G. N. Danavox, Inc. showed a deliberate disregard for the rights of plaintiff and awarded plaintiff punitive damages on this basis. The jurors also found that defendant Starkey Laboratories, Inc. had engaged in deceptive trade practices. Rule 50.02, Minnesota District Court Rules of Civil Procedure, provides that the Court shall grant a motion for judgment notwithstanding the verdict if the moving party would have been entitled to a directed verdict at the close of the evidence. The standard to be applied by the trial court in determining whether a motion for judgment notwithstanding the verdict should be granted is whether there is any competent evidence reasonably tending to support the jury's verdict. Such a motion admits every inference reasonably to be drawn from the evidence as well as the credibility of the testimony of the adverse party. Only where the facts are undisputed and reasonable minds can draw but one conclusion from them does the questions for determination become one of

law for the Court. *Lamb v. Jordan,* 333 NW 2d 852, 855 (Minn. 1983); *Conover v. Northern States Power Co.,* 313 NW 2nd 397, 401 (Minn. 1981); *Brubaker v. Hi-Banks Resort Corp.,* 450 NW 2nd 680, 683 (Minn. App. 1987). The Court has reviewed the evidence introduced by the parties during the course of this trial and is of the opinion that there is sufficient evidence to support each of the jury's findings. Defendant's motion for judgment norwithstanding the verdict in regard to each of the jury's findings should be denied.

Defendant moves the Court, in the alternative, for a new trial pursuant to Rule 59, Minnesota District Court Rules of Civil Procedure. This motion is also based upon numerous contentions. Defendant contends that the Court erred in allowing testimony by plaintiff's telemarketing employees regarding discussions they had with customers on the subject of the flyer at issue in the case and in regard to statements defendant's representatives had made to them regarding the financial condition of plaintiff. Defendant contends the Court erred in allowing logs kept by plaintiff's employees of calls they received concerning the flyer at issue and other statements made by defendant's representatives about plaintiff to be received as evidence. (It is noted that these statements and the information in the logs was received not for the truth of the statements but as statements made to plaintiff on the basis of which plaintiff took certain actions which were admissable on the issues of damages and mitigation of damages. Curative instructions were given to the jurors in this regard). Defendant contends the Court erred in not granting its motion to dismiss plaintiff's defamation suit because the statements allegedly made by it were not defamatory. Defendant contends the Court erred in not presenting the plaintiff's claims to the jury under a theory of injurious falsehood, malicious wrong or malicious injury rather than as a claim for defamation. Defendant contends the Court erred in refusing to require plaintiff to prove that defendant acted with actual malice in regard to plaintiff's defamation claim. Defendant contends the Court erred in

instructing the jury that the Court had determined that the flyer at issue was reasonably susceptible of a defamatory meaning and that plaintiff was entitled to recover damages for harm to its reputation. Defendant contends that the Court erred in refusing to instruct the jury that plaintiff must prove lost profits as an element of its libel claim. Defendant contends that the Court erred in refusing to exclude the financial testimony of Julie Champ, an employee of plaintiff. Defendant contends that the Court erred in refusing to strike plaintiff's breach of contract claim because plaintiff was not a party to the contract at issue, and even if it was, there was no evidence that the contract imposed any conditions upon defendant as to what use it could make of the hearing aids contracted for. Defendant contends the Court erred in submitting the issue of whether defendant violated the deceptive trade practices act to the jury. Defendant contends that the Court erred in allowing plaintiff's claim for punitive damages.

The test for deciding whether to grant a new trial is whether the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all of the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment. *LaValle v. Aqualand Pool, Inc.,* 257 NW 2d 324 (Minn. 1977). Defendant does not specify in its motion for new trial what subsection of Rule 59, Minnesota District Court Rules of Civil Procedure, it contends requires it be granted a new trial. In Plaintiff's Memorandum In Opposition To Defendant's Motion For Judgment Notwithstanding The Verdict, Remittitur, Or New Trial, plaintiff discusses each of defendant's contentions listed as a basis for a new trial. The Court having duly considered the testimony and exhibits received as evidence from the respective parties during the trial finds that the evidence adequately supports the jury verdict in this action. Further, there do not appear to be any errors of law which occurred at the trial which would have deprived defendant of a fair trial. In its

aforementioned memorandum in opposition to defendant's present motions, plaintiff adequately sets forth the reasons for the Court's finding that a new trial should not be granted for any of the reasons contended by defendant and no useful purpose would be served in reiterating those reasons in this Memorandum.

Defendant also contends that the punitive damages award was influenced by passion and prejudice and was excessive as a matter of law. Defendant also contends that the award of punitive damages in this case violates defendant's due process rights under the 14th Amendment of the United States Constitution as well as Article I, Section 7, of the Minnesota Constitution. Defendant moves for judgment notwithstanding the verdict, remittitur or a new trial in regard to the $1,500,000.00 punitive damage award. The Court's review indicates that the testimony and exhibits received as evidence during the trial adequately supports by clear and convincing evidence the jury's finding that the actions of defendant which constituted defamation toward plaintiff show a deliberate disregard for the rights of plaintiff. The evidence substantially supports an award of punitive damages to plaintiff. In regard to the amount of damages awarded, the Court would probably not have awarded punitive damages in an amount as great as was awarded by the jury. However, punitive damages are initially a jury question. "The weight and force to be given the evidence relating to punitive damages is exclusively a jury question." *Wilson v. City of Eagan,* 297 NW 2d 145, 150 (Minn. 1980). A court considering a motion for judgment notwithstanding the verdict may only grant the motion when the evidence is so overwhelmingly on one side that reasonable minds cannot differ as to the outcome. *Gillespie v. Klun,* 406 NW 2d 547, 554 (Minn. App. 1987). On a motion for a new trial, the standard of review the trial court must follow is whether the jury's verdict is justified by the evidence. *Hennen v. Huff,* 388 NW 2d 408, 411 (Minn. App. 1986). In deciding a motion for remittitur the trial judge must consider all the evidence, the demeanor

of the parties, and the circumstances of the trial, and in his discretion reduce the verdict of its amount is unsupported. *Sandt v. Hvlen,* 224 NW 2d 342, 343 (Minn. 1974); *Jangula v. Kloseck,* 170 NW 2d 587, 594 (Minn. 1969). Furthermore a trial court should grant remittitur only when the verdict is not the result of passion and prejudice, yet it is so grossly excessive as to shock the court's conscience. *Kociemba v. G. D. Searle & Co.,* 707 F. Supp. 1517, 1536 (D. Minn. 1989). In deciding whether to reduce damages, the trial court must leave the plaintiff with the highest dollar verdict permissable under the evidence. *New Master v. Mahmood,* 361 NW 2d 130, 133 (Minn. App. 1985). Punitive damages are governed by statute in Minnesota. In addition to the aforementioned standards of review, Minn. Stat. 549.20, Subd. 5 requires that the trial court review an award for punitive damages in the light of each of the factors contained in Minn. Stat. 549.20, Subd. 3. Minn. Stat. 549.20, Subd. 3, provides:

> "Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including the compensatory and punitive damage awards to the plaintiff and other similarly situated persons, the severity of any criminal penalty to which the defendant may be subject."

For the reasons set forth at page 22 through 27 of Plaintiff's Memorandum In Opposition To Defendant's

Motion For Judgment Notwithstanding The Verdict, Remittitur, Or New Trial, a review of the $1,500,000.00 punitive damages award in the light of each of the 549.20, Subd. 3, factors indicates to the Court that the jury's punitive damages award is not the result of passion or prejudice but is supported by substantial evidence. Further, although the Court would not have awarded this large an amount, the Court does not find the award so grossly excessive as to shock its conscience.

Defendant's contention that the punitive damages award on the basis of the facts of this case violates its due process rights under the United States and Minnesota Constitutions is not supported by existing law. Plaintiff cites no Federal or Minnesota cases to support its position. The United States Supreme Court has held that the 8th Amendment to the United States Constitution's excessive fines clause does not apply to award to punitive damages in lawsuits between private parties. *Browning-Ferris Industries v. Kelco Disposal, Inc.,* 109 S.Ct. 2909, 2913 (1989). However, the United States Supreme Court has never addressed the issue of whether the 14th Amendment's due process clause should "act as a check on undue jury discretion to award punitive damages in absence of express statutory limits. *Id* at 2921[1]. In addition, no circuit court has addressed this issue. *Eichenseer v. Reserve Life Ins. Co.,* 881 F2d 1355, 1365 (5th Cir. 1989). Neither party herein cites any Minnesota Appellate or Supreme Court decisions which have decided this due process issue either under the 14th Amendment to the United States Constitution or under Article I, Section 7, of the Minnesota Constitution. However the United States District Court for the District of Minnesota has twice decided the due process issue and both times rejected the claim that Minn. Stat. 549.20 violates a defendant's 14th Amendment due process rights and Article I, Section 17,

---

[1] The United States Supreme Court has granted certiorari in a case raising due process arguments regarding punitive damages. *Pacific Mutual Life Ins. Co. Haslip,* 553 S. 2d 537 (Ala. 1990).

of the Minnesota Constitution. *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517 (D. Minn. 1989); *Williams Pipeline v. City of Mounds View, Mn.*, 704 F. Supp. 914 (D. Minn. 1989). Applying the reasoning of these two cases to the facts of the present case, the Court finds that the jury's punitive damage award in the present case does not violate due process of law rights of defendant under either the 14th Amendment to the United States Constitution or Article I, Section 7 of the Minnesota Constitution.

STATE OF MINNESOTA

IN COURT OF APPEALS

C9-91-87

Hennepin County **Amundson, Judge**
District Court File No. 87-18918

GN Danavox, Inc.,
a Minnesota corporation,

Respondent,

Sandra F. Gilbert
John D. Kosanda
Courey, Schwinn, Kodadek
& Albers, P.A.
400 Marquette Avenue
Suite 300
Minneapolis, MN 55401

vs.

Starkey Laboratories, Inc.,
a Minnesota corporation,

Appellant.

Lawrence T. Hofmann
Terese S. Wallschlaeger
Zelle & Larson
33 South Sixth Street
City Center - Suite 4400
Minneapolis, MN 55402

Filed: October 8, 1991
Office of Appellate Courts

SYLLABUS

1. Logs kept by employees are properly admitted into evidence where the statements contained therein are not offered for the truth of the matters asserted.

2. Trial court did not abuse its discretion in refusing to remit or vacate the jury's award of punitive damages.

3. Minn. Stat. § 549.20 (1990), the Minnesota punitive damages statute, does not violate a defendant's right to due process by allowing the jury to consider the defendant's financial position.

Affirmed.

Considered and decided by Parker, Presiding judge, Forsberg, Judge, and Amundson, Judge

OPINION

AMUNDSON, Judge

Starkey appeals from the trial court's order denying its post-trial motions for judgment notwithstanding the verdict (JNOV), remittitur, or a new trial. We affirm.

FACTS

Danavox and Starkey compete in the manufacture and sale of hearing aids. In early 1987 Danavox claims it received reports Starkey's telemarketers had informed customers Danavox was going out of business. About the same time, Starkey purchased a small number of used hearing aids from Danavox. The parties' correspondence shows Starkey intended to use the hearing aids as parts in its all-make repair facility.

In July, Starkey circulated a flyer to over 10,000 of the parties' mutual customers. Entitled "Danavox Liquidation," the flyer claimed Starkey had received "large quantities" of Danavox hearing aids "[d]irect from Denmark." At trial, Danavox introduced three dictionary definitions indicating the word "liquidation" means "going out of business." Danavox also stressed that only 365 hearing had been purchased by Starkey, a relatively small amount in the hearing aid industry, and that the phrase "direct from Denmark" implied Danavox no longer existed in the United States.

Following distribution of the flyer, Danavox received approximately 100 telephone calls from customers questioning whether it was still in business. Many of the calls reflected concerned whether Danavox could service or warrant its hearing aids. J. Stephen West, Danavox's president at the time, testified that if a customer begins to question whether a manufacturer will be able to fulfill a warranty, that customer will purchase from another company. Larry Griffith, Danavox's national sales

manager, testified he received between 10 to 20 telephone calls from customers wanting to know what was happening to Danavox. Griffith further estimated that for every customer who responds, 10 to 15 with similar concerns will not respond.

Gerald Gitles, the president of a competitor hearing aid company, testified he received about 20 inquiries from customers as a result of the flyer, asking if Danavox was going out of business. Steve Chargo, one of Starkey's telemarketing managers, testified customers had called him or people in his department asking whether Starkey has purchased Danavox or whether Danavox was going out of business. Customer Gregory Wales testified when he received the flyer he thought Starkey had bought Danavox and they were dumping the products.

Within a week after West learned of the flyer, he began to interview public relations firms because he had concerns that customers no longer believed in Danavox's long-term viability. West eventually hired Wallace Public Relations, Inc. West's testimony suggests it was during these interviews that Wallace recommended Danavox keep track of customer calls.

West prepared a log form sheet and directed his employees to record customer calls. He testified "I'm not sure whether [keeping the logs] was [Wallace's] idea or mine." The logs were kept for only one and one-half to two months, until the volume of calls decreased. West testified the logs were kept in the regular course of business, and were not made with the intention of preserving customer complaints for litigation.

After the flyer was distributed on July 18, 1987, West testified Danavox experienced a significant drop in sales in its total product base. Although Danavox had budgeted higher sales for July than June because the company was entering its historically highest sales period of the year, July sales dropped by 30 percent. West and current Danavox president William Herzog testified there was no reason for the drop in sales other than the Starkey flyer. West further testified Danavox had been operating

profitably in the months preceding the flyer and fully expected that trend to continue.

Starkey's telemarketing manager Chargo testified he believed there was nothing wrong with sending out a flyer with the word "liquidation" next to a competitor's trademark and logo even with the certain knowledge it makes customers think the competitor is going out of business. Chargo indicated he would not hesitate to send out such a flyer in the future. William Austin, Starkey's president and sole shareholder, authorized release of the flyer. Austin's testimony also indicated he believed there was nothing wrong with the flyer.

Respondent GN Danavox, Inc. sued appellant Starkey Laboratories, Inc., alleging deceptive trade practices, defamation, intentional interference with business relations, false advertising, and consumer fraud. Danavox later amended its original complaint to include trademark infringement, breach of contract, and punitive damages claims.

During the trial, the court directed verdicts in Starkey's favor on the trademark infringement, interference with business relations, consumer fraud, and false advertising claims. By special verdict the jury awarded Danavox $4,729.20 on its breach of contract claim and $517,752 on its defamation claim. In addition, the jury found Starkey liable for deceptive trade practices. Accordingly, the trial court awarded Danavox $31,846 in attorney fees and $13,325.20 in costs, and permanently enjoined Starkey from engaging in further deceptive trade practices against Danavox. Finally, the jury found Starkey's defamatory conduct was in deliberate disregard of Danavox's rights and awarded Danavox $1.5 million in punitive damages.

ISSUES

1. Did the trial court err in admitting into evidence the logs kept by Danavox employees?

2. Did the trial court err in submitting the punitive damages issue to the jury or abuse its discretion in denying Starkey's motion for remittitur of the punitive damages award?

3. Did the punitive damages award violate Starkey's right to due process guaranteed under the United States or Minnesota Constitutions?

ANALYSIS

1. Danavox intially argues Starkey failed to preserve the evidentiary issue it now raises because its notice of motion and motion for post-trial relief alleged no specific grounds under Minn. R. Civ. P. 59.01. However, Starkey objected at trial to admission of the logs and addressed the issue in its memorandum supporting the new trial motion. Consequently, Danavox was given an opportunity to respond, and the trial court could address the issue in its order and memorandum denying Starkey's new trial motion. Under these circumstances, Starkey preserved the issue for appeal. *See Sauter v. Wasemiller,* 389 N.W.2d 200, 201-02 (Minn. 1986).

In addition, Danavox's argument that Starkey's memorandum in support of its new trial motion was untimely served is unpersuasive. Starkey met the time limit of Minn. R. Civ. P. 59.03, which merely requires notice of the new trial motion be served within 15 days of a general verdict.

2. Starkey contends the statements contained in the logs kept by employees were inadmissible hearsay. We disagree. The logs and the statements are not hearsay because they were not offered by Danavox to prove the truth of the matters asserted. *See* Minn. R. Evid. 801(c) ("hearsay" is defined as a statement offered to prove the truth of the matter asserted). Danavox offered the logs to show its customers were concerned it was going out of business, and to show why Danavox took steps to curb the flyer's negative effects, including hiring a public relations firm.

In addition, Starkey's argument that the trial court erred by failing to give the jury a limiting instruction lacks merit. Starkey neither objected to the trial court's hearsay instruction at the close of trial nor requested a more specific instruction. In fact, the court incorporated

Starkey's proposed hearsay instruction into its own. Under these circumstances, the trial court did not err.

Even if the log's admission was erroneous, Starkey was not prejudiced. *See Thurman v. Pepsi-Cola Bottling Co.*, 289 N.W.2d 141, 145 (Minn. 1980) (party complaining of discretionary ruling must show prejudice). The logs and the statements therein were not crucial to Danavox's defamation claim; instead they were merely cumulative of other evidence showing that after the flyer's release, Danavox's sales dropped off, customers inquired about Danavox's stability, and a public relations firms had to be hired. Accordingly, the trial court did not err.

II

Starkey argues that the trial court improperly submitted the punitive damages issue to the jury. Punitive damages are allowed in civil actions "only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20 subd. 1(a) (1990). Starkey advances three arguments to reverse or remit the punitive damages award, each of which we find unpersuasive.

Starkey first claims it never intended to imply Danavox was going out of business or to otherwise deceive the public. Its claim, however, is largely negated by the flyer itself, which contained so many misrepresentations it is difficult, if not impossible, to conclude they were unintended. Further, Starkey's other actions, such as having its telemarketers reporting Danavox was going out of business, suggest Starkey intended to injure Danavox. In short, the evidence showed that Starkey knew circulation of the flyer created a high probability of injury to Danavox's business, yet it acted with disregard for Danavox's probable injury. *See* Minn. Stat. § 549.20, subd. 1(b). Thus the trial court properly submitted the issue of punitive damages to the jury.

Second, Starkey contends the punitive damages award was founded upon compensatory damages which were based on inadmissible evidence and irrelevant testimony.

This argument is related to Starkey's previously rejected argument that the logs were inadmissible. As we have already concluded, the logs were corroborated by other evidence which tended to show the flyer negatively affected Danavox's business and reputation. We also find unpersuasive Starkey's argument that the $517,752 compensatory damage award is inflated and operates as a punitive damages award. While high, the jury's estimate of damages is supported by the evidence which showed Danavox suffered losses in sales, reputation, opportunity, and service business.

Third, Starkey argues the $1.5 million punitive damages award was based upon passion and prejudice. Starkey insists it was wrongly portrayed throughout trial as a large, rich company trying to eliminate its competition at any cost. This characterization, however, was supported by the conduct of Starkey employees and of its president at trial and during depositions. Accordingly, we accord deference to the trial court's decision and uphold the award. *See Hake v. Soo Line Ry.,* 258 N.W.2d 576, 582 (Minn. 1977).

III

Starkey finally argues the punitive damage award violated its right to due process. While Starkey failed to notify the attorney general as required by Minn. R. Civ. P. 24.04, the issue is important enough to warrant our consideration, and has been adequately briefed by the parties in the trial court and this court. *See Elwell v. County of Hennepin,* 301 Minn. 63, 73, 221 N.W.2d 538, 545 (1974).

In *Pacific Mut. Life Ins. Co. v. Haslip,* ___ U.S. ___, 111 S. Ct. 1032 (1991), the Supreme Court held that punitive damages awarded by an Alabama jury did not violate the fourteenth amendment's due process clause. In doing so, the Court stressed that the defendant was accorded procedural protections by adequate jury instructions, by post-trial procedure for scrutinizing the punitive damages award, and by the state's supreme court review. *Id.* at ___,

111 S. Ct. at 1046. The Court did note, however, that the $840,000 punitive damage award, which was more than four times the compensatory award, "may be close to the line" of constitutional impropriety. *Id.*

Starkey argues Minn. Stat. § 549.20, subd. 3 violates due process by permitting a jury to consider the financial condition of a defendant. In *Haslip,* the jury was not permitted, as a matter of state law, to consider or receive evidence of the defendant's wealth when it awarded punitive damages. *Id.* at ___, 111 S. Ct. at 1044. Financial position was, however, a factor which the trial court in *Haslip* considered when reviewing the propriety of the jury's award. Minn. Stat. § 549.20, subd. 5 similarly requires the trial and appellate courts to consider a defendant's financial condition when reviewing an award of punitive damages.

Starkey insists consideration of the defendant's financial condition does not advance the purpose of punitive damages, and breeds arbitrary and irrational deprivation of a defendant's property. We disagree. By having such financial information, a jury is better able to determine the amount necessary to punish or deter a defendant for its wrongful conduct. *Cf. Johnson v. Ramsey County,* 424 N.W.2d 800, 806-08 (Minn. App. 1988) (trial court's remittitur of $300,000 punitive damage award to $50,000 upheld where jury was provided no specific information on defendant's ability to pay), *pet. for rev. denied* (Minn. Aug. 24, 1988).

Starkey also argues its due process rights were impaired by the trial court's failure to make specific findings when reviewing the punitive damages award. Minn. Stat. § 549.20, subd. 5. The trial court's memorandum and order denying Starkey's post-trial motions, however, incorporated a large portion of Danavox's post-trial memorandum, which addressed the necessary factors. This incorporation and the remainder of the trial court's memorandum satisfy the findings requirement of the punitive damages statute.

DECISION

The order denying Starkey's motions for JNOV, remittitur, or a new trial is affirmed.

Affirmed.

Dated: October 2, 1991

Roland C. Amundson, Judge
Minnesota State Court of Appeals

STATE OF MINNESOTA

IN SUPREME COURT

C9-91-87

G. N. Danavox, Inc.,

Respondent,

vs.

Starkey Laboratories, Inc.,

Appellant.

ORDER

Based upon all the files, records, and proceedings herein.

IT IS HEREBY ORDERED that the petition of Starkey Laboratories, Inc. for further review be, and the same is denied.

Dated: January 17, 1992

BY THE COURT:

_____

Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

C9-91-87

G. N. Danavox, Inc.,

Respondent,

vs.

Starkey Laboratories, Inc.,

Appellant.

ORDER

Based upon all the files, records, and proceedings herein.

IT IS HEREBY ORDERED that Starkey Laboratories, Inc.,'s petition for rehearing on denial of petition for further review, be, and the same is, denied.

Dated: December 13, 1991

BY THE COURT:

_____

Chief Justice

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

GN Danavox, Inc.,
a Minnesota corporation,

Plaintiff,

vs.

Starkey Laboratories, Inc.,
a Minnesota corporation,

Defendant.

FILE NO. 87-018918
Appellate Court No.

TRANSCRIPT OF PROCEEDINGS

VOLUME XI

The above-entitled matter came on for hearing before the Honorable Daniel R. Hart, one of the Judges of the above-named court, with a jury present, commencing on the 22nd and 23rd days of August 1990, in Courtroom 359-C, Hennepin County Government Center, Minneapolis, Minnesota.

APPEARANCES:

SANDRA GILBERT, ESQUIRE, and JOHN KOSANDA, ESQUIRE, appeared as Counsel for and on behalf of the Plaintiff.

JOHN B. LUNSETH, II, ESQUIRE and WILLIAM J. EGAN, ESQUIRE, appeared as Counsel for an on behalf of the Defendant.

Reporter: Robert C. Flanders.

* * *

MR. LUNSETH: Then the other matter – I don't know if we need to make a record of it.

(Whereupon, a discussion was held off the record at the bench between Court and Counsel out of the

hearing of the Court Reporter.)

MR. LUNSETH: Since we're stipulating to foundation, there's not going to be a witness up there, perhaps we could have a ruling on our objections to the admissibility of some of this and then we could submit whatever the Court rules is admissible.

THE COURT: All right. What are the items that you wanted rulings on?

MR. LUNSETH: Well, their exhibit consists of the financial statements for the years December 31, 1987. That's one exhibit. And the second one is the financial statements for the year's end, December 31, 1989 and '88.

This occured in 1987. The Court has, by prior rulings about the evidence of Ms. Champ – the extent of Ms. Champ's tesitmony indicated, I believe, this occurance was 1987 occurence and weren't to get into '88 and '89.

It's our position the '88 and '89 financial statements are irrelevant and only the 1987 financial statement should go to the jury. We're also concerned about prejudicial effect, Your Honor, because the financial statement of retained earnings were cumulative every year and they jury won't necessarily understand they accumulate – not additive – they might look at it and say it's $10 million retained earnings in '87, more retained earnings in '88, add the '88 to '87 and pretty soon they're up in the 40 or $50 million range.

That would be confusing to the jury.

THE COURT: Looking at that point, isn't there some way that you can – I mean, you could call a witness to testify to that, obviously; but is there some way short of calling the witness; because you're thinking in terms of expediting the trial that you can get that information to the jurors, for example, by stipulation between you to that extent?

MS. GILBERT: Yes. I won't be arguing that.

MR. LUNSETH: That's fine. So we will still make the point that '88 and '89 financial statement –

THE COURT: Yes. I understand. But rather than two

motions, then apparently we would just have one motion in regard to whether they're relevant?

MR. LUNSETH: Right.

THE COURT: And you may respond to that motion.

MS. GILBERT: Thank you, Your Honor. One of the factors that the jury is to consider under 549.20 is the financial condition of the Defendant. And the law does not say the financial of the Defendant only in the year in which the wrongful act occurred. I think the jury is entitled to see the profits that this company brings in on an annual basis.

And the financial condition of the Defendant today is the relevant number for them to consider. I think that a reasonable person could infer that the wrongful conduct in 1987 has added to the profits of the Defendant in '88 and '89. I think any time you wound a competitor that's the case. We're not talking about negligence here. We're talking about, you know, that we have a very high standard of proof in proving deliberate disregard of the Plaintiff's rights.

And I think we need to put in the total picture where this Defendant is today and how financially capable they are of paying anything that the jury would award.

And you know, I think that the jury always have a concern about whether or not this is going to put people out of business, and just one year alone, doesn't – I don't think gives a very good picture of what's going on in this company and the fact that they have continued to grow at leaps and bounds in present years.

You know, they argue that the market was down. Well, their financial statements would show that their profits are way, way up and they continue to be way, way up and presumably it's because in part, at any rate, of this conduct.

So we – you know, we would ask that the Defendant provide some authority for limiting us to what happened in 1987 in one isolated year and would ask the Court to deny that motion. And since clearly, these subsequent years are relevant.

THE COURT: The Court would deny the motion in regard to not allow the financial statements for the periods ending December 31, 1988 and December 31, 1989 to be admitted as evidence in the trial.

As has been pointed out by Ms. Gilbert, the factors that the jurors are to take into consideration include the factor of the financial condition of the Defendant. Punitive damages are a penalty that the jurors are allowed to assess against the party under certain conditions that are set forth in the statute. And the financial statements for 1988 and '89 in this Court's opinion, are relevant to the issue of punitive damages.

So I would deny the motion to find them irrelevant and inadmissible.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

GN Danavox, Inc.,
a Minnesota corporation,

Plaintiff,

vs.

Starkey Laboratories, Inc.,
a Minnesota corporation,

Defendant.

FILE NO. 87-018918
Appellate Court No.

TRANSCRIPT OF PROCEEDINGS

VOLUME XI

The above-entitled matter came on for hearing before the Honorable Daniel R. Hart, one of the Judges of the above-named court, with a jury present, commencing on the 22nd and 23rd days of August 1990, in Courtroom 359-C, Hennepin County Government Center, Minneapolis, Minnesota.

APPEARANCES:

SANDRA GILBERT, ESQUIRE, and JOHN KOSANDA, ESQUIRE, appeared as Counsel for and on behalf of the Plaintiff.

JOHN B. LUNSETH, II, ESQUIRE and WILLIAM J. EGAN, ESQUIRE, appeared as Counsel for and on behalf of the Defendant.

Reporter: Robert C. Flanders.

* * *

THE COURT: Then, Ms. Gilbert, you may proceed with Plaintiff's final argument.

MS. GILBERT: Thank you, Your Honor.

Ladies and gentlemen, you have compensated Danavox for its losses, absolutely you have and for the losses that you found, but at this point there is a whole lot bigger issue than what did Danavox lose? The issue is what is going on with this company in this industry?

You're going to look at these financial records and you're going to see enormous profits. And they're enormous profits at the expense of people like Danavox.

We're going to ask you to consider what it will take to stop this company from ever sending out another liquidation flyer to anybody. And what is it going to take to stop these people from selling used hearing aids as new from a flyer which doesn't disclose that?

Let me show you -- if you have any doubt about whether or not this flyer was deliberate, compare it to one of the other flyers. When they sell reconditioned hearing aids, they say "Reconditioned Hearing Aids." When they sold these hearing aids, they didn't put that word anywhere (indicating).

In fact, they said they're very direct from Denmark. Wrong. Direct from Denmark in the industry means you sent them directly to Starkey. It means that they're new. You know they were not new. Large quantities of Danavox hearing aids; 365 out of 8,000 a week. Ridiculously low prices. You see here, the ridiculously low price might be $85, reconditioned aid, it certainly is not $125 for used hearing aid (indicating).

This was deliberate and it was a huge, huge scale. The effects of this lawsuit on somebody who makes $7 million a year are nothing. Absolutely nothing. Especially when it's three-years later.

You know, they say Starkey's on notice now. Starkey was on notice in 1987. Have they ever apologized? No. They sat on the stand and their officers told you they see nothing wrong with this flyer. If they see nothing wrong and it takes three years to get justice in this system, then what's to stop them -- what's to stop them from doing it again? They've got some more hearing aids.

What's to stop them from selling used hearing aids as new? Nothing.

These are underhanded practices and they have to stop. And that's right. You have to send a message to the whole industry, tell them clean up your act, Starkey. Don't sell used hearing aids as new and do not send out flyers liquidating somebody else's company. You have put Danavox back in a place you think they would have been in. But that is only taking back what is rightfully Danavox's.

What about all the other money in those pockets that is never touched if this is compensation that should have been there three years ago? But it wasn't. And if they were repentant and if they cared at all they would have apologized a long time ago. They got in phone calls. They got in phone calls and those people said, "Is Danavox liquidating?" Why didn't they give us those names? Why didn't they give us the names of the people they sent the flyer to?

They want to fault Danavox for not bringing in a whole lot of people here. If you ask yourself why wouldn't those people testify, I think it's obvious. Who wouldn't be afraid of a giant company who will send out this kind of trash to everybody and then say three years later on the stand in a court of law, there's nothing wrong with that. No big deal.

And so far, Starkey wins if all you do is put Danavox in place – they have won. They have delayed this three years. And you know, I'm not saying it's all their fault. It takes a long time to get a court date in this county and we have got a lot of cases. But it has taken three years and they've had three years to come to grips with it, what they have done to their competitor.

But instead, what is the attitude? I think it was portrayed very loud and clear to you yesterday. Did you hear laughing at the back of the courtroom during my final argument? Laughing from the Starkey people? Well, that's how seriously they take this lawsuit. They think it's funny. And they roll on the floor laughing when people call to their attention that unethical behavior is going on.

I'm sorry. $520,000 doesn't make a dent in the mentality of somebody who is willing to do that. And do you know

why? William Austin's deposition took four days and it wasn't a full four days, but that's right. Can you imagine trying to get a question answered by that man when the Judge isn't there? That's an impossibility. If I had to, in this courtroom, in front of you, ask the same question over and over and over again, you can just imagine how hard it was to get somebody to answer who was reading a newspaper while you were trying to question him.

That's another real good indication of this mentality.

And we'd like to see you make an impact. We'd like to see you affect what goes on in this industry and you have that opportunity. This is a creative and important thing to do in this industry. The message would be loud and clear in the hearing aid industry, do not engage in underhanded practices because you know what, you won't just have to give what you took away, we're going to dig into your pocket and we're going to take away some of your hard-earned money and see what that does to your mentality. Let's see if you think that's funny.

Now there are many different factors that you consider when you consider punitive damages. There has to be a deliberate disregard of the rights of that company, of Danavox. Well, what could be more deliberate than to use their trademark and send out a flyer liquidating their company? What could be more deliberate to sell aids, hearing aids to people you know are used as new because you get away with it? What could be more deliberate than sending a flyer to 10,000 customers and then refusing to give over those names?

What could be more deliberate than to make the kind of derogatory comments that you heard with your own ears? I don't need to go over some of the ridiculous statements again. You heard them and you saw the attitude of the Starkey people from the very top of the company. We're not talking about the messenger people. We're talking about the top of the company.

Now the seriousness to the hazard of the public. This is another factor to consider. Well, I think it's pretty serious to be sold a used hearing aid that somebody in another

country wore and what is to stop them from doing it again? What if they another batch of used hearing aids? What's to stop them? What is to stop them from attempting to drive everybody out of business?

You heard the deposition testimony of Jerry Gitles, a competitor, President of Electone. He says he's heard William Austin say he wants to sell all the hearing aids in the world. Well, this tactic is an awful good way to get there. It's taken Mr. Austin 20 years to get to be number one in the world or number one in the country; let's say maybe Siemen's is number one in the world, but number one in the United States in 20 years and will take another 20 to drive everybody else out of business.

How do we know these hearing aids that are put on people's heads are new or used? If they look new, I guess that's good enough for every single person in Minnesota and every single person in the United States and every single person that Starkey sells hearing aids to.

You can look at those industry's statistics and see they are growing, they are buying companies like that. They tried to buy Danavox and when they were told no, this is what happened. Why don't we just liquidate your company and then we will just see if you're going to be around for us to pick up the pieces.

I say when you take a look at their financial statements you're going to see how profitable this conduct is.

Another factor is the duration of the misconduct. Well, based on the flyer in 1987 and here we are today. Again, any apology? Any attempt to say, all right. We acknowledge this? You didn't hear that on the stand, did you? This has gone on until today.

Another factor to consider is the degree that the Defendant was aware and the hazard of its excessiveness. Well, they were aware from the very top on down. And also I hope you went through those invoices that were the sale of the hearing aids. I think you saw some of those hearing aids had already been sold, not just to the dispensers, sold on to people who bought them. And I think you probably also saw some of those dispensers when they received that

telephone call from Mr. Chargo, he said, some of them sent those hearing aids back. They didn't know -- they didn't know that these hearing aids were used.

And of course, they never told them they were used. Up until today there's no testimony they ever told them they were used. They were reconditioned according to Starkey. And that's good enough for Starkey. But it is not good enough for the American public. It is not good enough. And that's the message you need to send to them.

Okay. Another consideration, another factor is what is the attitude and what is the conduct of the Defendant upon discovery of the misconduct? We've already discussed the fact they laughed at this kind of thing. They laughed. Yes. This is a big joke. That's incredible.

But I don't know what else you can get from that; they think there's nothing wrong with sending out another flyer with the word "liquidation" to a competitor.

The other factor is the number and level of the employees involved in causing or concealing the misconduct. Again, it was top management, from the very top who authorized this.

Now the financial condition of the Defendant; that is for you to determine. Do these people have enough money? And let's just look at profit. You're going to find out and take a look I guess, 1986, 1987, 1988, 1989 just to see what was going on here. So you can compare, in 1986, all we have to show you are the income tax returns, but that income tax return shows more than $2 million of profit. It shows sales of 58,000 -- I'm sorry. I think that's $58 million. And it shows advertising costs of $4,596,000 advertising costs. Advertising like that defamatory flyer.

1987, we have financial statements from that year and that would be in Exhibit 35. That's right. They had profit --I'm sorry. This is profit after everything, after all of the salaries are paid, after all the rent if paid, everything is done, that's what their profit was that they show (indicating).

Well, but look at here, their sales are up to $77 million, and increase of 33 percent in sales in that year. And

what's really interesting, advertising, $7,149.000. Increase of about 55 percent; isn't that interesting, and increase in advertising in the same year that the liquidation flyer went out.

Now, 1988. They jumped from profits of $374,000 to $5,897,000 -- and only one person gets that profit because there's only one owner of the company.

1989. The profit this year is $7,283,676.

It looks like the conduct is profitable.

Now how do you make a dent -- how do you make a dent in the mentality of a company with profits that large? Not even asking them to cut back, not asking them to cut anybody's salaries, not asking to cut anything. This is the the number, th profit (indicating).

Now let's not do anything with '86. There's nothing there. There's no evidence that they did anything to Danavox in '86. If you add these three years, the profit since the flyer went out is $13,555,184.

Now of that profit, how much should you award in order to make a dent in the mentality? What would make a difference? I don't think you've got to take all the profit. I think that something less than that will send a message. If you would divided by three and take the average profit for every year -- and understand of course, they put an awful lot the year of the flyer into their advertising. I'm sorry. Advertising was here.

Just add those three together, even with this little number of $374,000, you come up with an average profit $4,318,395. And that number just might make a difference. It might make a difference so in the future nothing like this happens again. And they know if they sell those used hearing aids as new, it's going to cost them out of their money, not out of Danavox's money.

You should also note that in 1989 there's a notation in there for what their net worth is. That's all of the assets after you take out the liabilities, their net worth is $25 million. And I think the only question is, what amount is going to make difference to them? They say it was a mistake.

Now they acknowledge after you have made them own up to it, it's a mistake to send out the flyer. It is not a mistake (indicating). It is deliberate. And it is deceitful and it is painful and we hope that you will make sure that nothing like this ever happens again in the hearing aid industry.

Thank you.